

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KARL MANDEL ROBINSON,

Defendant-Appellant.

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UNPUBLISHED  
February 22, 2007

No. 265375  
Wayne Circuit Court  
LC No. 05-003415-01

Before: O'Connell, P.J., and Saad and Talbot, JJ.

PER CURIAM.

Defendant was tried by a jury and convicted of criminal sexual conduct in the second degree, 750.520c (aggravated sexual touching). Defendant was also charged with criminal sexual conduct in the first degree, MCL 750.520b (aggravated sexual penetration), but after it was clear that the jury could not agree on a verdict for the first-degree charge, the trial court declared a mistrial on this count. Defendant was sentenced as a third habitual offender, MCL 769.11, to 14 to 30 years' imprisonment. Defendant appeals as of right. We affirm and remand solely for the ministerial task of correcting the PSIR.

At the time of the offenses, defendant was a thirty-five-year-old parolee employed by an organization that provided personal care assistants to mentally and physically disabled individuals in group homes and assisted-living environments. The victim was an epileptic woman in her early twenties who lived in a group-living situation and relied on one of defendant's coworkers for practical day-to-day assistance. Defendant served a disabled male client who was a good friend of the victim.

On the day of the incidents, defendant was present at the friend's home during a visit by the victim and her assistant. While the victim's assistant helped the male friend with his homework, defendant called the victim back to a bathroom under the auspices of needing help with some laundry. The victim complied. While in the bathroom, defendant groped the victim's breasts under her clothing and touched her vagina outside her clothing. The victim felt uncomfortable and told defendant to stop, but he persisted. A few minutes later, the victim left the bathroom and returned to the kitchen where her assistant and the victim's friend were still reviewing his schoolwork. The assistant testified that the victim appeared agitated and upset, but did not say anything.

Shortly afterward, defendant again called for the victim, this time directing her to come to her friend's bedroom. The victim again complied, and in the bedroom, defendant again touched the victim's breasts under her clothing and touched her vagina. The victim again told defendant to stop, but he again persisted. When the victim returned to the kitchen her agitation was even more evident, and roughly forty-five minutes later, she grabbed her assistant's car keys and ran out to the car to go home. She later told her assistant what had happened, and her assistant took her to the police station to report the assault.

Defendant first argues that the evidence did not support the necessary propositions that he was in a position of authority over the victim, that he coerced her to submit to sexual contact, or that she was developmentally disabled. See MCL 750.520c(1)(h)(ii). "[W]hen determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992). When applying this deferential standard of review, "a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

Defendant first claims that his position of responsibility over the victim's friend did not place him in an authoritative position over the victim. We disagree. In *People v Reid*, 233 Mich App 457, 472; 592 NW2d 767 (1999), we clarified that the authoritative relationship between a defendant and a victim did not have to be formal. Instead, the issue turns on whether the defendant was in a position of "practical authority" and "general control" that left the victim "in a position of special vulnerability." *Id.* at 472. The evidence substantially demonstrated that the disabled or handicapped clients who had assistants relied on them extensively for guidance, practical support, and direction, even if an assistant "in charge" was not the assistant particularly assigned to them. In this case, the evidence suggested that defendant had unquestioned authority to call the victim away from her friend and her assistant for the proper purpose of training her in a domestic task or merely to prevent her from interfering with her friend's studies. This demonstrated both a practical authority and general control that allowed defendant to isolate the victim, which then provided him with an even greater measure of control and left the victim even more vulnerable. See *id.* The existence of defendant's authority can be reasonably inferred from his ability to direct the victim's actions, his role as an authority figure,<sup>1</sup> and the victim's restrained reaction to his unwanted groping.

We also reject defendant's argument that even if he had authority, the prosecutor did not prove that he "used this authority to coerce the victim to submit." MCL 750.520c(1)(h)(ii). We disagree. Defendant's authority certainly enabled him to isolate the victim, and it is a reasonable inference that the same authority that provided defendant access to the victim also provided him

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<sup>1</sup> We reject defendant's argument that the presence of the victim's assistant precluded him from exercising any authority over the victim. Just as a teacher does not lose authority by momentarily supervising another teacher's classroom, defendant did not lose any of his authority by directing the victim during her assistant's preoccupation with the victim's friend.

with the leverage to suppress her protestations and physical resistance, enabling him to complete his crime. The concepts of coercion and submission are expansive enough to include an exercise of authority that implicitly communicates that resistance to the unwanted sexual contact is futile or subject to harsh retaliation. *People v Premo*, 213 Mich App 406, 410-411; 540 NW2d 715 (1995). In this case, defendant's initial exercise of authority, the victim's subdued request that he stop touching her, and his indifference to this request all indicate that he used his authority to coerce the victim's submission. The evidence strongly suggests that defendant used his authority to accomplish the second touching. After returning, upset and disheveled, from the bathroom, the victim again complied with defendant's request to see her alone. Taken in a light most favorable to the prosecution, this fact not only demonstrates defendant's authority and its blatant abuse, but it also demonstrates the victim's diminished faculties and their affect on her ability to fend off defendant's forced sexual contact. Defendant's assault in the bedroom was clearly the product of an abuse of his authority to coerce the victim's submission.

Last, defendant contends the prosecution failed to establish that the victim was mentally disabled. "Mentally disabled," defined under MCL 750.520a(g), means that a person has mental illness, is mentally retarded, or has a developmental disability. A "developmental disability" is defined under MCL 750.520a(b) as:

an impairment of general intellectual functioning or adaptive behavior which meets all of the following criteria:

- (i) It originated before the person became 18 years of age.
- (ii) It has continued since its origination or can be expected to continue indefinitely.
- (iii) It constitutes a substantial burden to the impaired person's ability to perform in society.
- (iv) It is attributable to 1 or more of the following:
  - (A) Mental retardation, cerebral palsy, epilepsy, or autism.
  - (B) Any other condition of a person found to be closely related to mental retardation because it produces a similar impairment or requires treatment and services similar to those required for a person who is mentally retarded.

According to testimony given at trial, the victim developed epilepsy before age eighteen. As a result, she is substantially burdened in her ability to perform in society, as evidenced by testimony that she lives in a group home environment, is unable to drive, and needs assistance with shopping and managing her finances, among other day-to-day living requirements. Because there was sufficient evidence that the victim had a developmental disability that impaired her intellectual functioning and adaptive faculties, the jury could reasonably find that she was mentally disabled for the purposes of the statute.

Defendant next argues on appeal that he was denied due process by the trial court's improper admission of evidence under the excited utterance exception to the hearsay rule.

Evidentiary issues are reviewed for abuse of discretion. *Campbell v Sullins*, 257 Mich App 179, 196; 667 NW2d 887 (2003). To be admissible under the excited utterance exception to the hearsay rule, MRE 803(2), there must be a “startling event,” and the statement must be made “while under the excitement caused by the event.” *People v Straight*, 430 Mich 418, 424; 424 NW2d 257 (1988). Trial courts are given wide discretion in deciding whether the declarant was still under the excitement of the event. *People v Smith*, 456 Mich 543, 552; 581 NW2d 654 (1998). Although the amount of time that elapsed between the event and the statement is an important factor to consider, “[i]t is the lack of capacity to fabricate, not the lack of time to fabricate, that is the focus of the excited utterance rule.” *Id.* at 551.

Defendant challenges the admissibility of statements made by the victim and another female assisted-living client he allegedly groped at his client’s home within a few hours after the first assaults that underlie his convictions in this case. Defendant argues that the hearsay testimony of the women’s assistants should not have been admitted because too much time had elapsed between the alleged assaults and the women’s accusatory statements, and because their statements were made in response to questioning from the assistants and not the excitement of the events. We are persuaded that the statements were made “under the excitement” of the startling events that precipitated them. *Straight, supra*. Each statement was made within a few hours of the violating and embarrassing contact, and the physical demeanor of the victims strongly suggested that the shock of the contact had not dissipated. The evidence also suggested that neither victim had a high capability of fabricating the remarkably similar incidents, so we find no evidentiary support for defendant’s argument that the statements were the product of the assistants’ general questioning and not the humiliating and shocking groping episodes. Moreover, the statements were only brief, consistent recapitulations of the witnesses’ first-hand testimony, so defendant fails to demonstrate any impairment of a substantial right. MRE 103(a).

Defendant next claims on appeal that he is entitled to resentencing because the prosecutor was allowed to make an untimely amendment to the information and defendant did not receive actual notice of the prosecutor’s intent to seek an enhanced sentence for defendant as a third habitual offender. We disagree. This Court held in *People v Ellis*, 224 Mich App 752, 755-756; 569 NW2d 917 (1997), that a habitual offender notice may not be amended to include additional prior convictions after the 21-day period allowed by MCL 769.13(1). However, this Court held in *People v Hornsby*, 251 Mich App 462, 472; 650 NW2d 700 (2002), that “*Ellis* does not preclude the amendment of a timely sentence enhancement information to correct a technical defect where the amendment does not otherwise increase the potential sentence consequences.”

The original information in the present case contained notice of three prior felony convictions. The untimely amended information did not include any additional prior convictions, but rather, made a technical correction to the description of the conduct underlying the first-degree criminal sexual conduct charge, which did not result in a conviction. Therefore, the untimely filed amended information did not violate the requirements of MCL 769.13(1). *Hornsby, supra*.

Next, defendant asserts he did not receive notice, as required under MCL 769.13(2), that he would be sentenced as a third habitual offender. A failure on behalf of the prosecutor to strictly follow the statute does not necessarily offend due process, if in fact a defendant has actual notice. *People v Walker*, 234 Mich App 299, 313-314; 593 NW2d 673 (1999). At sentencing, the court was unable to locate the second page of the amended information in the

court file, which contained the habitual offender, third offense notice. However, the prosecution produced a copy of the amended information at sentencing, and it did have the second page showing the habitual third offender notice. Defendant did not claim at sentencing that he never received notice of sentence enhancement, so he has not even demonstrated a technical violation of the statute. Under the circumstances, defendant fails to provide factual support for this claimed error.

Defendant next claims on appeal that the trial court failed to respond to his claim of inaccuracies in the presentence investigation report (PSIR). If a sentencing court either disregards the allegations of inaccurate information or determines that the information was in fact inaccurate, it must strike the disputed or incorrect information before sending the PSIR to the Department of Corrections. *People v Spanke*, 254 Mich App 642, 649; 658 NW2d 504 (2003); MCL 771.14(6). If a sentencing court fails to address disputed information, it must indicate that it did not consider that information in making a sentencing determination. *Spanke*, *supra*.

Defendant argued that the PSIR misidentified the victims, incorrectly stated that defendant did not claim to have any siblings, erroneously accused him of violating his parole by using marijuana, and falsely declared that he had a pending case in the 36th District Court for improper plates. However, the sentencing judge specifically corrected the PSIR to reflect the correct victim and present an accurate account of relevant events, and the court further stated that it would also correct the PSIR to indicate that defendant claimed to have a sister and a deceased brother. Therefore, defendant fails to demonstrate any error by the trial court regarding these superficial challenges to the report.

Regarding the other alleged discrepancies, the trial court stated that it would merely note defendant's denials regarding the pending case in district court and the parole violation. However, the trial court also indicated that the claimed error regarding a plate violation would not materially affect defendant's position with the department given defendant's felony offenses. The trial court also expressed a marked indifference to the validity of the challenged probation violation. Although the trial court should have technically obliterated the challenged statements from the PSIR rather than merely noting defendant's challenges, it is abundantly clear from this record that the alleged errors in the PSIR had no effect on the trial court's sentence. The trial court essentially accepted defendant's claims as true for its purposes, and it only erred by trying to preserve an accurate and consistent file for the department.<sup>2</sup> Therefore, defendant is not entitled to resentencing, see *People v Landis*, 197 Mich App 217, 219; 494 NW2d 865 (1992), and the only practical remedy available to defendant is correction of the report. Therefore, we simply direct the trial court to strike the information regarding the case in district court, to strike the statements regarding his marijuana violation, and make any other corrections necessary to conform the PSIR to this opinion.

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<sup>2</sup> Defendant's repeated exposure to the department and its procedures convinces us that the trial court did not need to be so zealous in its preservation of the report's challenged statements. If defendant's challenges lack merit, then the department has a sufficiently thorough criminal record to establish an accurate factual basis for its decisions.

Affirmed. This case is remanded solely for the ministerial task of correcting the PSIR.

/s/ Peter D. O'Connell  
/s/ Henry William Saad  
/s/ Michael J. Talbot